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No. 96-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ACORN, *et al.*,

Petitioners,

v.

EDWIN EDWARDS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Movant Public Citizen hereby seeks leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari. The Petition seeks review of a decision of the Court of Appeals for the Fifth Circuit. That court struck down as unconstitutional a section of the Lead Contamination Control Act of 1988, 42 U.S.C. § 300j-24(d), even though the case had been settled as moot and the only issue on appeal was an award of attorneys' fees to petitioner. Copies of petitioners' and the United States' written consent have been lodged with the Clerk. Attorney for the respondent has informed the undersigned counsel of record that he does not consent to the filing of a brief *amicus curiae*.

Public Citizen is a non-profit, consumer advocacy organization with nearly 100,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the

enforcement of a wide-range of health and safety, environmental, and other consumer legislation. Public Citizen has also represented named parties and *amici* in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Foundation v. United States Dep't of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 115 S. Ct. 315 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In doing so, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford competent counsel, to enforce the substantive mandates of federal law.

While petitioners have presented the question whether the court of appeals erred in holding that the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-24(c) & (d), amending the Safe Drinking Water Act (SDWA), is constitutional under the Tenth Amendment, *amicus* Public Citizen does not believe that the Court need or even should reach the constitutional question presented. Rather a writ of certiorari should be granted because it was improper for the court of appeals to decide the constitutionality of a federal statute in reviewing an award of attorneys' fees in a case in which the merits become moot. The United States is unlikely to urge the Court to adopt the position advanced by *amicus* Public Citizen because of the United States' institutional interest as a defendant in attorneys' fee litigation. We ask therefore that Public Citizen be granted leave to file the accompanying brief *amicus curiae* in support of granting a writ of certiorari upon the question presented by the attached brief.

Respectfully submitted,
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QUESTION PRESENTED

Amicus Public Citizen believes that certiorari should be granted only on the following question:

In deciding whether to award statutory attorneys' fees in a settled case, must a federal court first decide that plaintiffs would have prevailed on the merits, especially where the merits include ruling on an affirmative defense that the statute on which the claim was based is unconstitutional?

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS*

The interest of *amicus* Public Citizen is set out in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

A. Proceedings in the District Court

This case has its origins in the ongoing efforts of a public interest organization, petitioner Association of Community Organizations for Reform Now (ACORN), on behalf of the citizens of Louisiana, and a group of concerned parents, to force the State of Louisiana to comply with the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300j-24(c) & (d), amending the Safe Drinking

Water Act (SDWA). The LCCA requires, *inter alia*, state officials to distribute to Louisiana schools a list of lead-lined water coolers published by EPA in the Federal Register and to assist local educational agencies, schools, and day care centers in remedying lead contamination in their drinking water systems. The procedural history of the case is set forth in detail in the Petition for a Writ of Certiorari at pages 11-13. For the purposes of this brief, only a few facts are significant.

First, there was no adjudication of the merits because the parties reached an agreement to dismiss the case as moot. After the complaint was filed, Louisiana had made reasonable improvements in its implementation of the LCCA, and petitioners wished to concentrate on monitoring the State's implementation of its lead remediation program rather than on litigation. Therefore, the district court did not decide either party's summary judgment motion on the merits, but instead granted a consent motion to dismiss on grounds of mootness which explicitly reserved the parties' rights to seek attorneys' fees.

Second, respondents opposed petitioners' petition for an award of fees and costs on numerous grounds, but the district court found for petitioners. Reasoning that "[a] plaintiff may be a prevailing party in the absence of a judicial determination on the merits," the district court made specific findings in support of its conclusion that the lawsuit had catalyzed respondents to comply substantially with the LCCA and awarded petitioners their requested fees and costs. Petition at A-22-A-26. In its fee award opinion, the district court reiterated that petitioners' claims on the merits had been mooted by respondents' compliance with the LCCA. *Id.* at A-21.

B. Proceedings in the Court of Appeals

Respondents appealed the award of attorneys' fees, raising numerous allegations of error. *Id.* at A-8. While explicitly acknowledging that the case had been dismissed as

moot, A-7, the court of appeals announced that, to receive an award of attorneys' fees, plaintiffs must demonstrate that "they had alleged a violation of a lawful requirement of the Act." *Id.* at A-18.

Noting that respondents had challenged the LCCA as violative of the Tenth Amendment, the court of appeals considered each provision in turn. The first provision, 42 U.S.C. § 300j-24(c), requires that states distribute a list of lead-lined water coolers prepared by EPA to schools. Accepting respondents' representation that its distribution of a list prior to the filing of the complaint complied with LCCA--a hotly-contested and unresolved issue in the district court--the court of appeals found that there was no valid allegation of a violation of section 300j-24(c) at the time petitioners instituted the lawsuit, and therefore that petitioners were not entitled to fees incurred for pursuing a section 300j-24(c) claim. *Id.* at A-11.

The second provision, 42 U.S.C. § 300j-24(d), led the court of appeals to engage in a more searching inquiry on the statute's constitutionality. Section 300j-24(d) requires the states to develop plans to remedy lead contamination in school drinking water systems. During oral argument on the fee award, the court of appeals asked the parties to submit post-argument memoranda on whether this statutory provision violates the Tenth Amendment, and it permitted the United States to intervene. *Id.* at A-12.

Subsequently, the courts of appeals issued a decision striking down section 300j-24(d) as violative of the Tenth Amendment. *Id.* at A-17. In light of that ruling, the court held that petitioners were not entitled to fees because they had failed to allege that respondents were in violation of any "lawful requirement" of LCCA at the time of filing suit and dismissed petitioners' claims. *Id.* at A-18.

REASONS FOR GRANTING THE WRIT

Despite the fact that the parties had agreed to dismiss this case as moot, and the fact that an appeal had been taken only from the award of attorneys' fees, the court of appeals held that a court may not award attorneys' fees unless the plaintiff can prove a violation of a lawful statutory requirement. Moreover, the court went even further, striking down a major federal environmental and public health statute as unconstitutional, even though the parties had explicitly abandoned their right to litigate that question.

This decision—to reach out and decide the merits of a moot case, and to strike down a federal statute as unconstitutional in the process—warrants review by the Court because it creates a conflict with decisions of this Court and other courts of appeals over the proper standards for awarding statutory attorneys' fees. Furthermore, by virtually mandating the issuance of advisory opinions on sensitive constitutional issues, the decision creates an irreconcilable conflict with the express direction of this Court that the federal courts should avoid deciding constitutional issues unless necessary.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS OVER THE PROPER STANDARD FOR AN AWARD OF ATTORNEYS' FEES.

By holding that petitioners had to prove that respondents were in violation of a lawful requirement of the LCCA, the court of appeals has, in effect, required petitioners to prove their case at the fee award stage, even though the merits have been fully resolved and the underlying controversy is now moot. Review should be granted because the Fifth Circuit's approach is at odds with

the decisions of this Court and the lower federal courts under environmental and other fee-shifting statutes.

Awards of attorneys' fees and costs under citizen suit provisions in environmental statutes are governed by substantially the same standards developed under other fee-shifting statutes, including the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. *See Pennsylvania v. Delaware Valley Citizens Counsel*, 478 U.S. 546, 560 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983) (listing federal environmental and public health statutes with statutory fee provisions). In order to receive a fee award, a plaintiff need not show that it would have prevailed on the merits of a case that settles prior to final adjudication. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Rather it must show that it has achieved "some degree of success on the merits." *Ruckelshaus*, 463 U.S. at 694.

In *Maher*, the Court affirmed a fee award under 42 U.S.C. § 1988 to plaintiffs who had obtained a consent decree, despite defendant's argument that fees could not be awarded where no formal judicial relief on the merits had been entered. 448 U.S. at 129. The complaint in *Maher* had alleged federal claims on which the lower courts had not passed, but this Court simply observed that they were "sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, [415 U.S. 528 (1974)]." *Id.* at 131. The Court deemed important that the federal claims "remained in the case until the entire dispute was settled . . . ." *Id.* As Justice Powell declared in his concurring opinion, because the federal claims were "substantial" under *Hagens*, the Court had "no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action." *Id.* at 134.

The environmental fee-shifting cases follow this approach. *See, e.g., Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1257-58 (D.C. Cir. 1993) (RCRA); *Sierra Club v. EPA*, 769 F.2d 796, 799-802 (D.C. Cir. 1985) (Clean Air Act). A plaintiff may be a prevailing party in the

absence of a judicial determination on the merits. *See, e.g.*, *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993). To receive a fee award, a plaintiff must demonstrate that it was a "prevailing party," by obtaining at least partial success on the merits, whether through full adjudication or by otherwise achieving the relief sought. *See Ruckelshaus*, 463 U.S. at 694; *see also Colorado Environmental Coalition v. Romer*, 796 F. Supp. 457, 459 (D. Colo. 1992) (awarding attorneys' fees to environmental group as prevailing party in efforts to compel state to comply with the LCCA).

A plaintiff prevails if the relief obtained alters the defendant's behavior in a way directly benefitting the plaintiff. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992). While a plaintiff is not entitled to fees if it obtained only a technical or insignificant victory, *see id.* at 574, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teacher's Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989) (awarding attorneys' fees to teacher's union that had succeeded on "significant issue" of litigation and rejecting test from Fifth and Eleventh Circuits that required success on the "central issue"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

If a party is deemed prevailing, courts generally apply the two-step approach first established in *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), to determine whether a plaintiff, who has gained some of the relief sought, without obtaining a ruling on the merits, should be awarded fees. *First*, the plaintiff must show that the suit was *a* causal factor in obtaining the relief. *Id.*; *see Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987). Here, the district court found, as a matter of fact, that petitioners had substantially prevailed because their suit caused respondents to improve their compliance with the LCCA. *Second*, plaintiff must show that the legal premise of the suit was not frivolous,

unreasonable, or groundless, *Nadeau*, 581 F.2d at 281 (citing *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)), but no further showing of the ultimate merits of the suit is required. *Id.*[1] Here, the district court found that the lawsuit was necessary to catalyze respondents' compliance with the LCCA, and the court of appeals never intimated that this case was frivolous.

The *Nadeau* standard has been followed in almost every circuit in cases interpreting a variety of federal fee-shifting statutes under which reasonable attorneys' fees may be awarded. The Fifth Circuit had previously adopted a variant of the *Nadeau* test, but the difference was not great. Under that approach, plaintiffs had to show that the goals of the lawsuit were achieved, that the suit caused the defendant to remedy the alleged harm, and that the lawsuit was a "substantial factor" or "significant catalyst" in motivating the defendants to end their illegal behavior. *See Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993); *Associated Builders & Contractors of La. Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 478 (5th Cir. 1990); *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982).

Despite the binding precedent from this Court and Fifth Circuit law directly governing statutory fee awards, the

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[1] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992) (not "frivolous or groundless"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990) (not "frivolous, unreasonable or groundless"); *Sablan v. Dep't of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988) (same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983) ("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982) (not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981) (not "frivolous, unreasonable or groundless"); *Staten v. Housing Auth. of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980) ("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (not "frivolous, unreasonable or groundless").

decision in this case radically departs from the developed body of attorneys' fee law and mandates that lower federal courts decide the merits of the case at the fee petition stage. By instructing that a court pass on the merits of a plaintiff's claims even though the case had been dismissed as moot, the Fifth Circuit's approach follows that in the Tenth and the Eleventh Circuits which require a showing that the defendant's actions are legally required before fees may be awarded. *See Dunn v. Florida Bar*, 889 F.2d 1010, 1015 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990); *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). As a result, those courts have rendered lengthy advisory opinions on significant issues of constitutional law in the context of deciding fee petitions. *See, e.g.*, *Foremaster v. City of St. George*, 882 F.2d 1485, 1488-89 (10th Cir. 1989) (Establishment Clause inquiry), *cert. denied*, 495 U.S. 910 (1990); *Luethje v. Peavine School Dist. of Adair County*, 872 F.2d 352, 354-56 (10th Cir. 1989) (detailed First Amendment inquiry). Therefore, there is a split in the circuits between courts, like the Fifth, Tenth and Eleventh, which require plaintiffs to "relitigate" and win their claims at the fee stage, and the other courts of appeals which require only a showing that plaintiff has substantially prevailed and was a catalyst.

The Court has never allowed a decision on a fee petition to turn into an adjudication of the merits even in situations in which Congress has indicated that courts should conduct some review of the merits of a defense before a fee award. Even where there is no fee-shifting statute, prevailing parties in environmental litigation against the government may obtain fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. *See, e.g.*, *Herren v. City of Jamestown, Kentucky*, 39 F.3d 628, 630-32 (6th Cir. 1994); *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993); *Roanoke River Basin v. Hudson*, 991 F.2d 132, 138-39 (4th Cir.), *cert. denied*, 114 S. Ct. 182 (1993). Under the EAJA, fees may be denied if the government can

show that its position on the merits was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Yet even with this statutory directive, this Court has cautioned courts against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce v. Underwood*, 487 U.S. 552, 561 (1988).

Review should also be granted because the decision of the court of appeals will make it very difficult to settle disputes under environmental and public health statutes. Resolution of citizen suits short of a ruling on the merits allows the parties to avoid the costs and uncertainties associated with complex litigation. A system in which a plaintiff's successful settlement of a citizen suit is followed by examination of the merits of their underlying claim as part of a fee application, would render meaningless Justice Powell's admonition that a "request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437; *see also Long v. Bonnes*, 455 U.S. 961, 966 n.3 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari) (test for determining right to fees "does not require a finding that the petitioners would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid").

The decision of the court of appeals will undermine the longstanding, and increasingly important, public policy favoring settlement and other forms of extra-judicial dispute resolution. *See, e.g.*, *Marek v. Chesney*, 473 U.S. 1, 5, 10-11 (1985); Fed. R. Civ. P. 68; Fed. R. Civ. P. 16(a)(5), (c)(7). Not only will the court of appeals' decision reduce the likelihood of settlement on the merits, but it will give defendants another reason to refuse to settle fee disputes, that is, they can challenge the merits even in a moot case, as respondents did here.

Moreover, the decision removes the incentive to settle to avoid the setting of precedent where the parties are not

confident about the likely outcome. This incentive is particularly important in public law litigation where the merits of the case are likely to have far-reaching consequences. Avoidance of the resolution of controversial issues by the courts, and particularly sensitive constitutional issues, is made much more difficult if the merits are thrust upon the plaintiffs at the fee stage.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH EXPRESS INSTRUCTIONS OF THIS COURT TO AVOID DECIDING CONSTITUTIONAL QUESTIONS UNLESS NECESSARY.

Beyond this split in authority, what is most distressing about the decision of the court of appeals is the potential for damage to the bedrock constitutional principle enshrined in Article III, Section 2, that federal courts sit to decide "cases" or "controversies." While, of course, petitioners' right to fees was, and is, a live controversy, the merits of the instant case were not.

Nevertheless, the court of appeals issued an advisory opinion and, in perhaps the most disturbing aspect of the case, struck down as unconstitutional an important section of a federal statute. By rendering a major constitutional decision in a case in which the merits had been mooted, the court of appeals violated this Court's oft repeated and unequivocal command to avoid reaching constitutional questions unless it is necessary to decide them *See Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445-46 (1988); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58 (1984); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979) *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring.) The court of appeals appeared to recognize that it should avoid reaching constitutional issues

if possible. Petition at A-8 (citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1977)). Nonetheless, by ignoring the substantial body of case law governing statutory fee awards in settled cases, and instead requiring petitioners to prove that they had relied on a constitutional and winnable legal theory, the court established a legal test which virtually requires the issuance of advisory opinions on sensitive constitutional questions.

The court of appeals' foray into the constitutional merits of a statutory provision in a mooted case requires this Court's attention for all of the reasons that Article III prohibits the issuance of advisory opinions and proscribes limits upon the federal judicial role. This bright-line rule against advisory opinions serves the commendable policies of maintaining a proper separation of powers, conserving judicial resources, and ensuring that cases are presented to the Court in terms of specific disputes and not hypothetical legal questions. *See Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

When this case reached the court of appeals, the merits of the original controversy were moot. Two markers of justiciability were lacking: there was no actual dispute between adverse litigants on the issue upon which the court ruled, and there was no likelihood that a court decision in favor of the petitioners would bring about any change or effect regarding respondents' underlying conduct. The only live controversy remaining in the case was whether petitioners were entitled to a fee award. On that question, the parties were unquestionably adverse. However, the relevant question for the fee award, whether petitioners were prevailing parties, was not the question on which the court of appeals rendered its decision. And on that question--the constitutional validity of the LCCA--there was no actual controversy.

Moreover, the court of appeal's decision will not change the parties' behavior in any material way. Respondents have already completed the relevant acts

proscribed by the LCCA by distributing a list of lead-lined water coolers to schools and implementing a plan to assist schools in remediating lead in their drinking water. Whether respondents did so because of the lawsuit or independently is relevant for purposes of the fee award. But the controversy over fees did not create a live controversy over the constitutional validity of the LCCA. It was improper for the court of appeals to use the fee dispute as an opportunity to examine respondents' affirmative defense.

All in all, the court of appeals' decision requires lower federal courts to entangle themselves unnecessarily in constitutional questions even where the merits of the case are no longer justiciable. *See United States v. Freuhauf*, 305 U.S. 146, 157 (1961). This holding violates fundamental tenets of constitutional jurisprudence developed by this Court over many years and should not be allowed to stand.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted and the Court should require that the parties brief the Question Presented by this brief.

Respectfully submitted,

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